

From: "Kester, John"
To: Lee_Rosenthal
Date: 12/10/2009 09:12 AM
Subject: Mohawk--rulemaking

09-AP-D

Dear Lee,

I hope that this finds you well. Probably you are aware of the Supreme Court's decision Wednesday in Mohawk Industries, Inc. v. Carpenter, no. 08-678, which dealt with whether certain attorney-client-privilege rulings are appealable under the Cohen doctrine, and in the course of its holding (and even more in the concurring opinion) referred to the authority to deal with such issues through the rulemaking process. One could read it all as an invitation to bring some order to the somewhat ad hoc Cohen jurisprudence through rulemaking.

I have no particular view on whether our body should step into this, or, if it did, what and how extensive the answers should be. It seemed to me that the most one would do at this point, if anything, would be to refer the topic to the Appellate Advisory Committee for them to ponder; maybe they would plan to do that, anyway. Perhaps it is worth mentioning at our meeting as, if nothing else, evidence of the respect of the Justices for the rulemaking apparatus (including, no doubt, the Chair of the Standing Committee).

Wishing you a happy holiday season, and looking forward to seeing you next year,

John

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